COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts	DTE 01-31

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc. ("AT&T") hereby requests that the Department of Telecommunications and Energy (the "Department") grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted by Verizon Massachusetts ("Verizon") in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that the two attachments provided by Verizon in its supplemental response to ATT-VZ 2-8 be granted protective treatment because they contain competitively sensitive and highly proprietary AT&T information and trade secrets. Attachment 1 provides the number of AT&T lines, by wire center, that are included in Verizon's Massachusetts Competitive Profile. Attachment 2 is a compact disk ("CD") which includes all statewide E911 records for AT&T as of October 30, 2001.

Verizon has already provided these materials to the Department and to those parties to whom AT&T authorized disclosure. If these materials are placed in the public record, however, AT&T's competitors would be able to use them to gain an unfair competitive advantage. In

addition, the location and telephone numbers of AT&T's end-user customers will be available for public review.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

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[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc.* v. *James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc.* v. *Crampton*, 385 N.E.2d 1349, 1355 (1979).

(1) the extent to which the information is known outside of the business;

(2) the extent to which it is known by employees and others involved in the business;

(3) the extent of measures taken by the employer to guard the secrecy of the information;

(4) the value of the information to the employer and its competitors;

(5) the amount of effort or money expended by the employer in developing the information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company* v. *Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

II. ARGUMENT.

The attachments to Verizon's responses to ATT-VZ 2-8 contain competitively sensitive and proprietary information and trade secrets belonging to AT&T and end-user customers. This information is not publicly available and is not considered public information. As discussed in more detail below, these materials provide the location and telephone numbers of AT&T

customers and include valuable commercial information that competitors could unfairly use to their own advantage. Thus, these materials should be granted proprietary treatment and should not be placed on the public record.

In its supplemental response to ATT-VZ 2-8, Verizon provided: (1) in Attachment 1 the estimated number of AT&T UNE-P and E911 lines, by wire center, that Verizon reported in its Massachusetts Competitive Profile; and (2) a CD with all AT&T records of telephone numbers in the E911 database managed by Verizon. This information is highly proprietary. Because Attachment 1 to ATT-VZ 2-8 provides the number of AT&T customers provisioned from each wire center and because the CD contains information about the location (by house number and street name), the class of service, and telephone number of end-user customers, this information is proprietary customer data which should not be placed on the public record.

First, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 *et seq*., provides protection for the confidential and proprietary information of telecommunications customers. *See* 47 U.S.C. § 222. Among other things, Section 222 protects "customer proprietary network information", which includes the "technical configuration, type, [and] destination" of telecommunications service subscribed to by any customer of a telecommunications carrier.[2] The CDprovides: the name, street address, telephone number, class of service, type of service and telecommunications carrier of individual AT&T

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[2] Section 222(f)(1) defines "customer proprietary network information" in relevant part as:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
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> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

customers. *See* ATT-VZ 2-8(2) (attached as Exhibit A). The CD, therefore, contains customer proprietary network information. Pursuant to Section 222, not only must every telecommunications provider "protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers…and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier," 47 U.S.C. § 222(a), but:

> a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall *only* use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.
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> 47 U.S.C. § 222(c) (emphasis added).

Thus, because the CD contains customer proprietary network information, both Verizon and AT&T are required to safeguard this sensitive material. No customer has authorized the disclosure of this information.

Second, both attachments to ATT-VZ 2-8 identify the locations and numbers of AT&T's customers by wire center, providing AT&T's competitors with a window into AT&T's planning and marketing strategy. Because the UNE-P and E911 information listed in Attachment 1 is provided by wire center and because the CD containing AT&T's E911 records identify the location and telephone numbers of AT&T's customers, this information would allow AT&T's competitors to target specific geographic areas and specific customers for competition. The Department has recently recognized that the identification of wire centers with the number of business lines within each wire center deserves proprietary treatment in order to avoid anti-competitive targeting and prevent competitors from gaining an unfair competitive advantage. *See Interlocutory Order On Verizon Massachusetts' Appeal Of Hearing Officer Ruling Denying*

Motion For Protective Treatment, D.T.E 01-31 (August 29, 2001) ("Interlocutory Order") at 9 (directing Verizon to provide for public disclosure a response that redacted the wire center identification in order to alleviate the possibility of anti-competitive targeting); *Hearing Officer Ruling on Verizon Massachusetts' Motions for Confidential Treatment*, D.T.E. 01-31 (August 29, 2001) ("HO Ruling") at 6 (granting Verizon motion in part) (same).

As a comparison, on October 22, 1999, in D.T.E. 98-57, Verizon sought protective treatment of information relating to the location of collocation arrangements, arguing that "[w]here carriers choose to establish collocation arrangements or situate their POTs not only identifies where their facilities are located, but more importantly may provide valuable insight into where their customers reside or where they are focusing their competitive marketing efforts, thereby giving competitors an unfair business advantage." *See* Bell Atlantic's Motion for Confidential Treatment, D.T.E. 98-57, at 3 (October 22, 1999)(emphasis added). Significantly, in an Order dated November 5, 1999, the Department agreed with Bell Atlantic and ruled that the location by carrier of collocation arrangements in each central office, the number of POTs by carrier, and the number and name of CLECs with a single POT in a LATA which have their traffic switched through a tandem switch are confidential or competitively sensitive material which should not be place on the public record. *See Hearing Officer Ruling on Motion for Confidential Treatment by Bell Atlantic-Massachusetts*, D.T.E. 98-57 (November 5, 1999), at 5.

In the present situation, the information sought to be protected is just as sensitive as the location of collocation arrangements. Whereas the location of collocation locations "*may* provide valuable *insight* into where their customers reside," providing the actual telephone numbers and addresses of end-user customers served by AT&T, and the total amount of AT&T

customers by wire center, *will* provide competitors with *actual knowledge* of where AT&T's customers reside, "thereby giving competitors an unfair business advantage."

Third, the attachments to Verizon's supplemental response to ATT-VZ 2-8 provide AT&T's competitors with direct insight into AT&T's internal investments, in particular AT&T's network facilities. Because the information is provided by wire center, competitors will be able to gain valuable data about the amount of facilities AT&T has in place at each wire center in order to service the listed number of end-user customers. Competitors can unfairly use this valuable commercial information to their own advantage because it provides competitors with knowledge of whether AT&T has been engaged in extensive recent development of new facilities and whether AT&T will have to make substantial investments in the near future. The Department has recently recognized that a company's levels of investment is proprietary information because "disclosure of this information could assist [the company's] competitors in development of sales and investment strategies." *See Hearing Officer Ruling on Verizon Massachusetts' Motions for Confidential Treatment*, D.T.E. 01-31 (August 29, 2001) ("HO Ruling") at 4 (granting Verizon motion in part).

Finally, this information is not publicly available and Verizon is prohibited from disclosing the information.[3] Because of the confidential and proprietary nature of E911 data, the Department has recently accorded protective treatment to CLEC E911 information. *See Hearing Officer Ruling on Motion by AT&T Communications of New England, Inc. to Compel Discovery Responses by Verizon Massachusetts, or, in the Alternative, to Strike Testimony of Robert Mudge*

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[3] *See* 47 U.S.C. § 222(a)-(b).

and William E. Taylor, and Motion by Verizon Massachusetts for Confidential Treatment, D.T.E. 01-31 (September 14, 2001) at 9 (protective treatment accorded and Verizon required to provide AT&T with the information under protective conditions).

Thus, the materials contained in the attachments to ATT-VZ 2-8 should be granted proprietary treatment and should not be placed on the public record.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D that the Department grant protective treatment to the attachments to Verizon's supplemental response to ATT-VZ 2-8.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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